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No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CHESTER C. SANSON,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER AN EMPLOYEE WHO IS DEFRAUDED BY HIS EMPLOYER INTO RETIRING IN ORDER TO PREVENT THE EMPLOYEE FROM PARTICIPATING IN A PENSION BENEFIT PROGRAM HE WOULD OTHERWISE HAVE PARTICIPATED IN IS PRECLUDED FROM ASSERTING A CLAIM UNDER STATE LAW BY VIRTUE OF § 514(A) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA") (29 U.S.C. § 1144(A).

II. WHETHER, ASSUMING FEDERAL PREEMPTION UNDER ERISA, ERISA AFFORDS NO REMEDY TO AN EMPLOYEE WHO IS DEFRAUDED INTO RETIRING AND IS THEREBY PREVENTED FROM PARTICIPATING IN A PENSION BENEFIT PROGRAM IN WHICH HE OTHERWISE WOULD HAVE PARTICIPATED.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are set forth in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Chester C. Sanson ("Sanson") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 966 F.2d 618. The opinion of the district court granting summary judgment (App. 17a-23a) is not reported. The earlier opinion of the district court (App. 24a-26a) denying summary judgment is also not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1992. A timely petition for rehearing with suggestion for rehearing en banc was denied by the court of appeals on September 16, 1992. This petition is filed

within ninety days of the entry of the order denying. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Employee Retirement Income Securty Act of 1974 ("ERISA") involved in this case are ERISA § 514(a) (29 U.S.C. § 1144(a)) and ERISA § 502(a)(1) (29 U.S.C. § 1132(a)(1)).[1]

11 U.S.C. § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(k) of this title.

11 U.S.C. § 1132(a)(1) provides:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided in subsection (c) of this section, or
>
> (B) to recover benefits due him under the terms of this plan to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan.

STATEMENT

The decision of the Court of Appeals for the Eleventh Circuit in this case turns ERISA into a tool of abuse for an employer bent on depriving an employee of pension benefits he would otherwise receive. As Judge Birch states at the outset of his dissenting opinion:

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[1] For convenience, ERISA is hereinafter referred to by citation to Title 29 of the U.S. Code.

> An employer in this circuit can now hoodwink a long time employee and leave him stranded without any recourse whatsoever. This result stands the entire statutory scheme on its proverbial head.

996 F.2d at 623.

Sanson spent his career as an employee of General Motors Corporation ("GM"). Near the time he was reaching retirement age, rumors abounded that a special early retirement program was going to be offered to plant employees at the company's assembly plant in Atlanta, Georgia, where Sanson had worked. He checked with his manager, who advised him that he was unaware of such a plan, but that he would inquire and advise Sanson as to whether the benefits would be offered. Sanson was subsequently informed by his superiors that they had made inquiry and that special early retirement plan would not be offered at the Atlanta assembly plant and that his remaining in GM's employ would therefore yield him nothing in the way of additional retirement benefits. Relying upon these representations, Sanson retired under this company's standard early retirement program. Approximately thirty days later, GM offered the special early retirement program which Sanson was told would not be offered. The evidence overwhelmingly establishes that GM had decided before Sanson retired to offer the benefits in Atlanta, that his superiors knew this information, but knowingly misrepresented the facts to him in order to present him from participating in the special early retirement program.

This lawsuit was initially filed in state court based upon state law theories of fraud and misrepresentation. GM removed the case to federal court, asserting both diversity and federal question (ERISA) jurisdiction. After discovery, GM moved for summary judgment. The district court denied the motion, holding that sufficient facts existed for a jury trial on the issue of fraud, and that contrary to GM's contentions, there was no preemp-

tion under ERISA. In its order, the district court declared that "ERISA expressly provides for the preemption of 'any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . .' 29 U.S.C. § 1144. State laws, however, that have only a tenuous effect on employee benefit plans are not preempted . . . . The fact that the misrepresentations concerned the availability of an employee benefit plan is only incidental to plaintiff's claim . . . . [T]herefore, plaintiff's claim for intentional misrepresentation is not preempted by ERISA. [Citations omitted]." App. 25a.

In 1990, this Court handed down its opinion in *Ingersoll-Rand Company v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). In the proposed pre-trial order, GM requested that the district court consider the application of *McClendon* to its earlier ruling. In response to this request, the Court ordered GM to file a second motion for summary judgment. By order dated May 24, 1991, the district court reversed its prior ruling, holding as follows:

> The court recognizes that 'a central policy goal of ERISA is to protect the interest of employees and their beneficiaries in employee benefit plans.' *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986), citing *Shaw v. Delta Airlines*, 463 U.S. 85, 90, 105 S.Ct. 2890, 2896 (1983). The court is troubled that that goal is not furthered by the court's denying plaintiff relief in this case . . . . Yet, the court believes that a faithful application of the reasoning of *McClendon* to the facts of this case requires a finding that plaintiff's cause of action under Georgia law is preempted under ERISA.

App. 22a. The court further denied Sanson's request to amend its complaint to state a claim under ERISA on the ground that such amendment would be "futile." App. 23a.

The Eleventh Circuit opinion endorses the district court's view of *McClendon*. In so doing, it creates a hor-

ribly unjust precedent which Congress, in enacting ERISA, could not possibly have intended. A gaping hole now exists in the law whereby (1) a state law cause of action for fraud is gobbled up by ERISA's preemption statute and (2) once within the confines of ERISA, the plaintiff has no remedy of any kind because he has been defrauded out of being a "participant" in an ERISA plan and is therefore without standing to obtain any relief under ERISA's civil enforcement statute. The fraud has been judicially insulated from any redress. The majority of the court of appeals views itself as powerless to address this state of affairs because, unlike other circuits, it endorses "the restrictive interpretation" of § 1132(a) whereunder the language of the statute, narrowly construed, "defines the specific circumstances upon which one may be granted legal or equitable relief." 966 F.2d at 622, App. 8a.

The majority of the court of appeals openly acknowledges that other circuits have endorsed the view that "Congress specifically contemplated that federal courts in the interests of justice, would engage in interstitial law making in ERISA cases in much the same way as the courts fashioned a federal common law of labor relations under § 301 of the LMRA." *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989) and that consistent with this directive, other circuits have found ERISA standing outside of the literal confines of § 1132(a). However, the court interpreted existing precedent as preventing this outcome.

In dissent, Judge Birch acknowledged that there need not be a remedy for every wrong. However, he went on, "where there is a remedy (here a state fraud action), I find it difficult to comprehend, in a common sense way, how a law enacted to protect the very class of individuals into which the appellant squarely fits can be construed to deny him such a preexisting remedy. I am concerned

that by adopting such a judicial construction, a court could interpret its way into the province of the legislative branch, and in so doing thwart what Congress set out to accomplish in the first place." 966 F.2d at 623 n. 2, App. 10a.

The state law at issue, Judge Birch observed, was nothing more than a general fraud statute. "Apparently, the majority would not have had any difficulty if the benefit misrepresented had been the availability of a new Oldsmobile automobile instead of the availability of a special retirement program. But why should the substance of GM's misrepresentation matter? The state fraud law utilized by Sanson does not purport to operate according to the content of the fraud; instead, all material frauds are equally actionable. Whether GM lies about a special retirement plan benefit or an Oldsmobile automobile benefit, the state law at issue still provides a cause of action." 966 F.2d at 624. App. 13a-14a. In short, it was purely fortuitous that the property out of which Mr. Sanson was defrauded was a pension benefit. Whether an individual has a remedy should not be dependent upon the nature of the property out of which the plaintiff has been defrauded.

The dissent not only distinguished the pension-oriented law that was the subject of *McClendon* (and the fact that the plaintiff in *McClendon* had an express remedy under ERISA), but also demonstrated how the policy advanced in *McClendon*—forcing plaintiffs to assert federal causes of action in order to ensure uniform pension law and in order to adequately notify employers about pension obligations—are not served under the majority ruling. If, as the majority held, no parallel federal lawsuit exists, there is no conflict or even duplication of federal law. "And the only notification offered to employers is that they may lie to future retirees about potential future benefit plans without fear of repercussions, as long as the fraud at issue involves misrepresentations as to the

very existence of a special retirement plan . . . . In this way, the combination of the majority's holdings—that Sanson's state cause of action is preempted by ERISA even while ERISA denies him any alternative remedy—is disappointingly pernicious to the very goals and desires that motivated Congress to enact pension laws in the first place." 966 F.2d at 625, App. 15a.

Judge Birch concluded his dissent with a plea that this Court further refine the law of ERISA preemption. "Perhaps I have entered the [preemption] thicket and lost the path that my brothers have found and followed. However, if nothing else is clear it is that the 'path' is not; obviously, the Supreme Court needs to do some serious bushhogging in the ERISA preemption thicket." 966 F.2d at 625, App. at 15a-16a.

This Court is urged to grant this Petition and hold either that Sanson's claims are not preempted by ERISA, or, if they are, that ERISA offers a remedy for the fraud practiced upon him.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW UNNECESSARILY EXTENDS THE BOUNDARIES OF ERISA PREEMPTION BEYOND ANYTHING CONTEMPLATED BY CONGRESS OR THE DECISIONS OF THIS COURT

McClendon was a wrongful discharge case brought in Texas. The Texas Supreme Court held that, notwithstanding Texas' adoption of the at-will doctrine, public policy "required recognition of an exception" which "allowed recovery in a wrongful discharge action if the plaintiff could prove that 'the principle reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.'" *McClendon*, *supra*, 111 S.Ct. at 479. In essence, the Texas Supreme Court had judicially created a cause of action under Texas law against employers who terminated employees in order to avoid paying pension benefits.

On certiorari, this Court expressly limited the issue before it to "whether [ERISA] preempts a state common law claim that an employee was unilaterally discharged to prevent his attainment of benefits under a plan covered by ERISA." *Id.* 111 S. Ct. at 481. The Court specifically distinguished "a generally applicable statute that makes no reference to, or indeed that functions irrespective of, the existence of an ERISA plan . . . . Here, the existence of pension plan is a critical factor in establishing liability under the state's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself." [Emphasis in original.] After citing other precedent, this Court went on to find the Texas cause of action preempted by ERISA because the *law* creating the cause of action "[m]akes specific reference to, and indeed is premised on, the existence of a pension plan. . . . . Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relate[s] to' an ERISA plan." *McClendon*, *supra*, 111 S. Ct. at 483.

The state law upon which Sanson has sued has nothing to do with pension plans. Official Code of Georgia Ann. §§ 23-2-52 and 51-6-2 are statutes of general application, a codification of common law fraud principles. It is only a fortuity that under the specific facts of this case, the fraudulent misrepresentation at issue involved the availability of special early retirement benefits. Under Georgia law, all that matters is that some fraudulent misrepresentation was made and that this misrepresentation, reasonably relied upon, caused the plaintiff some damage. *See, e.g., Eckerd's Columbia, Inc. v. Moore*, 155 Ga. App. 4, 270 S.E.2d 49 (1980).

McClendon stands for the principle that in determining ERISA preemption, the state law in question must be examined to determine whether the cause of action created thereby is "related to" an employee benefit *plan*

within ERISA's reach The fundamental difference between *McClendon* and the case at bar is that, here, the existence of a pension plan is not essential to the cause of action upon which Sanson's claim is based. The fraud at issue in this case occurred *before* the special early retirement program was even offered in Atlanta. Damages are not sought from a pension plan, but from GM, which committed the fraud. While it is true, as the Eleventh Circuit majority opinion notes, that "the [Georgia fraud] statute would not apply to this case without the existence of the retirement plan" (966 F.2d at 621, App. 6a), such a "but for" factual relationship is all that exists.

The essential holding of the Eleventh Circuit on the preemption issue is that "[b]ased upon the Supreme Court's interpretation and application of ERISA in *McClendon*, the district court properly applied *McClendon* to hold that federal law preempts Sanson's state law claims." 966 F.2d at 621, App. 5a. However, *McClendon* should not and cannot be read as broadly as the court of appeals reads it. There are numerous factual scenarios which might arise wherein the existence of an ERISA plan is a necessary part of the proof and yet, notwithstanding this "but for" relationship, it would be unimaginable that ERISA preemption would apply. The dissenting opinion provides the example of an employer who sexually harasses the female manager of a pension plan, and she pursues a state law harassment claim. Simply because the female employee might have to prove the existence of the pension plan under state law would not mean that her claim is lost.

The fact that the calculation of damages under state law might require reference to an ERISA plan cannot be determinative of an ERISA preemption issue either. *See, e.g., Jaskilka v. Carpenter Technology Corp.*, 757 F. Supp. 175, 178 (D. Conn. 1991). Consider, for exam-

ple, an employer who enters into an agreement with an individual to have him leave one company and join another. The employee is promised compensation, which includes a pension equal to that which he is receiving from his present employer. What if no ERISA plan is established by the new employer? If a breach of contract action is brought by the new employee, the calculation of damages would necessarily require reference to an ERISA plan. Such an action is wholly remote in content from ERISA. Yet, under the court of appeals' analysis, the state law action would be preempted by ERISA because "but for" the pension from prior employment, it would be impossible to establish the amount of recoverable damages.

The court of appeals decision highlights the schism which is developing in the courts as to the effect of ERISA preemption on state law tort claims. As stated in *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 583 n.19 (10th Cir. 1991):

> Numerous other courts have held that ERISA does not preempt state law claims for fraud in the inducement because such claims are too tenuous or remote to the ERISA plan to be "related to" the plan as required for preemption under § 1144 of the statute. *See, e.g., Perkins v. Time Co.*, 898 F.2d 470, 473 (5th Cir. 1990); *Martin v. Pate*, 749 F. Supp. 242, 246 (S.D. Ala. 1990); *Greenblatt v. Budd Co.*, 666 F. Supp. 735, 742 (E.D. Pa. 1987); *Miller v. Lay Trucking Company*, 606 F. Supp. 1326, 1333 (N.D. Ind. 1985). This precedent again suggests that ERISA is not directed to prevention of the sort of pre-participation fraud and misrepresentation that would be actionable under the Securities Act.

See also Hospice of Metro Denver, Inc. v. Group Health Insurance of Oklahoma, Inc., 944 F.2d 752, 756 (10th Cir. 1991).[2]

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[2] Other cases diverging from the Eleventh Circuit analysis are *Totten v. New York Life Insurance Company*, 685 F. Supp. 27 (D.

The overriding problem with the majority opinion of the court of appeals is that the court is trying to make *McClendon* govern the outcome of the preemption issue in this case when in reality *McClendon* did not resolve the issue presented. There is nothing in *McClendon* or other precedent of this Court which demands or authorizes the court of appeals' all-inclusive reading of the ERISA preemption statute. ERISA's preemption sweep is no doubt broad, but there has to be some rational limitation placed on it. The majority opinion represents an unreasonable extension of the *McClendon* decision.

It is respectfully requested that this Court step back and look what the majority opinion of the court of appeals in this case does. If the view is adhered to that ERISA precludes one in Sanson's position from having standing to redress fraud committed against him, a claim for fraud, which would have been recognized under the law of every state, is now being thrown out on the basis of a statute whose very title—Employees Retirement Income Security Act—signifies a congressional intent to protect the retirement income of employees. The oppressiveness of such a ruling exists not in the fact that *a* remedy has been taken away. Congress clearly has the power to preempt an area of the law and provide such remedies as it sees fit. *See, e.g., First National Life Insurance v. Sunshine-Junior Food Stores*, 960 F.2d 1546, 1550 (11th Cir. 1992); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989). What is oppressive here is that a significant and universally recognized remedy is being extinguished and not one word of the ERISA statute or the legislative history indicates that such a result was actually intended. Surely, if Congress had intended to take such a drastic measure with respect to

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Conn. 1987); *Sandler v. New York News, Inc.*, 721 F. Supp. 506, 513-14 (S.D.N.Y. 1989); *Cuocov NYNEX, Inc.*, 722 F. Supp. 884, 886-87 (D. Mass. 1989); *Independence HMO v. Smith*, 733 F. Supp. 983 (E.D. Pa. 1990); *Providence v. Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal. 1981).

such an important pre-existing remedy, it would have somewhere let this intention be known and stated a rationale for its action.

The intervention of this Court is desperately needed. In the existing framework of the law, there is no basis for concluding that pre-participation fraud by an employer constitutes a federally protected activity.

II. IF PRE-PARTICIPATION FRAUD CLAIMS UNDER STATE LAW ARE PREEMPTED BY ERISA, THE DECISION BELOW SEVERELY MISCONSTRUES EXISTING PRECEDENT IN FINDING THE FEDERAL COURTS POWERLESS TO DECLARE A FEDERAL COMMON LAW OF ERISA WHICH AFFORDS PETITIONER A REMEDY

The second holding of the court of appeals—that Sanson has no claim under ERISA—represents a construction of the ERISA statute. The ultimate goal of statutory construction is, once again, to determine congressional intent.

Unless Sanson is deemed a "participant" in the special early retirement program, there appears to be no express statutory basis under ERISA for maintaining the present action.[3] 29 U.S.C. § 1132(a)(1) provides that a civil action

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[3] A new analysis has very recently been provided by the Sixth Circuit which could significantly affect the outcome in this case. In *Drennan v. General Motors Corporation*, —— F.2d ——, 1992 WL 277010 (6th Cir. 1992), the court held under very similar facts that, because the voluntary early retirement program offered by GM was a buyout of the plaintiffs' existing pension plans, the plaintiffs were plan "participants" and that GM had a fiduciary duty under ERISA not to make material misrepresentations respecting a prospective or contingent ERISA plan under serious consideration by the company. Here, the effect of the special early retirement program would have been to add to Sanson's basic retirement plan by adding several years of service to his underlying plan. If Sanson is a plan "participant" on this basis, his case falls squarely within the ERISA statute, and the district court erred in labelling his effort to amend the Complaint as "futile."

may be brought—"(1) by a participant or beneficiary." ERISA defines a "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees and such employer . . . or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7). The "may become eligible to receive the benefit" language has been interpreted so as not to refer to an employee who retires before the plan is implemented, but to an individual who has "a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989). *See also Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986).

This, however, does not end the inquiry. If the federal courts have indeed been granted exclusive control virtually every time the word "pension" appears in a case, it is the responsibility of the federal courts to fashion appropriate relief, consistent with the language and policies of ERISA, so that individuals like Sanson who suffer traditionally remediable wrongs with respect to retirement benefits, are not left twisting in the breeze.

The Eleventh Circuit considers itself powerless to act because of its reading of this Court's decision in *Pilot Life Ins. Company v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987), wherein the Court states:

> [T]he detailed provisions of [29 U.S.C. § 1132(a)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claim settlement procedures against the public interest in encouraging the formation of employee benefits plans. The policy choice reflected in the inclusion of certain remedies in the exclusion of others under the federal scheme would be completely

> undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in [§ 1132(a)] of the statute as finally enacted . . . provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."

The Eleventh Circuit majority is simply wrong in applying the holding of *Pilot Life* to a case such as this. The quoted language of *Pilot Life* was addressing whether a specific type of relief (punitive damages), not included in the types of relief authorized by ERISA, could be recovered. The Court held that such damages were not recoverable under ERISA. The issue now before this Court is standing to sue—i.e., whether one who presumably does not meet the statutory criteria of "participant" under § 1132 (because he was defrauded out of participating) is thereby precluded from any remedy whatsoever under ERISA.[4] The court of appeals' heavy reliance on the case of *McCrae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991) demonstrates quite clearly that the majority is addressing the issue in this case based upon decisions relating to another, unrelated issue. *McCrae* addressed the issue of whether extra-contractual damages could be recovered under § 1132 (a)(3)(B) despite the fact that this portion of the statute only mentions equitable remedies. In holding that such damages could not be recovered, the Eleventh Circuit was acting in a manner consistent with other circuits.

Here, however, the Eleventh Circuit is acting in conflict with other circuits. The cases the majority has cited

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[4] Should Sanson's case be deemed preempted by ERISA, Sanson acknowledges that any recovery he receives must be limited in accordance with the policies dictated by ERISA. 966 F.2d at 621, App. 7a.

as following "the restrictive interpretation of [§ 1132 (a)] as set forth in *Pilot Life*" all deal with a preemption issue, not whether, once preempted, a claim exists under ERISA.[5] In enacting ERISA, Congress knew there would be gaps in the law, and it called upon the courts to fill them. *See Pilot Life, supra*, 107 S.Ct. at 1557-1558, and the legislative history contained therein. As stated in *Plucinski v. I.A.M. National Pension Fund*, 875 F.2d 1052, 1056 (3rd Cir. 1989):

> Since Congress both authorized and expects that the courts will create a common law under ERISA, we need not look for a specific congressional intent to create the remedy at issue. Instead, the inquiry is whether the judicial creation of a right in this instance is "necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in large by Congress."

Other circuits (including the First, Third, Fourth, Fifth, and Sixth) have recognized a private right of action under ERISA notwithstanding a plaintiff's inability to satisfy the statutory definition of "participant," "beneficiary," "fiduciary," or "Secretary," the only entities listed in § 1132. *See Kwatcher v. Massachusetts Service Employees Pension Fund, supra; Plucinski, supra; Jamail,*

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[5] One of the cases cited by the majority, *Lee v. E.I. Dupont de Nemours and Company*, 894 F.2d 755, 758 (5th Cir. 1990) specifically states: "[w]e do not decide whether ERISA would provide relief on the facts of this case." It is difficult to comprehend how a case which expressly reserves judgment on the availability of a remedy under ERISA can be read as endorsing "the restrictive interpretation" of § 1132. In *Jamail, Inc. v. Carpenter's District Council of Houston Pension and Welfare Trusts*, 954 F.2d 299, 304 n.10 (5th Cir. 1992), the Fifth Circuit indicated that the Eleventh Circuit may stand alone in holding that courts are precluded from establishing a federal common law regarding who has standing to sue under ERISA. In *Jamail*, the issue was whether an "employer," who is *not* one of the parties granted standing under § 1132, had a federal common law right under ERISA to obtain restitution from an ERISA trust. The court held that it did.

supra; Whitworth Bros. Storage Company v. Central States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986); *Provident Life and Accident Ins. Company v. Waller*, 906 F.2d 985, 987-88 (4th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 512, 112 L.Ed.2d 524 (1990)). *See also Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452-53 (4th Cir. 1992); *Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employees Pension Fund*, 847 F.2d 113, 121 (3rd Cir. 1988).

The court of appeals concludes its opinion with a statement from *McCrae* that "in the face of clear precedent to the contrary from the Supreme Court, the Eleventh Circuit, and other circuits, this Court cannot create a federal comon law of remedies for the benefit of a plaintiff and the sole authority of [a congressional report]." 966 F.2d at 622. As has been demonstrated, the court of appeals' determination that there is "clear precedent to the contrary" is mistaken. There is no authority from this Court, or any circuit court, holding that the ERISA statute precludes a claim within ERISA's jurisdiction of the type presented in this case.

In view of the clear responsibility of the federal courts to develop a federal common law of ERISA, this Court should act in providing such needed guidance to the circuit courts should ERISA preemption be found. ERISA itself makes the interference with protected rights of a participant or beneficiary unlawful. 29 U.S.C. §§ 1140, 1141. ERISA proscribes misrepresentations by an ERISA fiduciary regarding a prospective or contingent ERISA plan. *Drennan v. General Motors Corporation*, *supra*. It defies belief that the same Congress which made these pronouncements would knowingly deprive an individual who, in the absence of fraud, would clearly have been a participant in a pension program, from any redress at all. Such a result is neither logical nor just.

CONCLUSION

A viable fraud claim exists under state law, and it has not been preempted by ERISA. If this Court determines that preemption under ERISA is mandated, this Court should declare a remedy under the ERISA statute or fashion a remedy under the federal common law of ERISA so that pre-participation fraud by an employer is not elevated to the level of a federally protected activity. For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 10, 1992

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-8528

CHESTER C. SANSON,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

July 15, 1992

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and RONEY, Senior Circuit Judge.

RONEY, Senior Circuit Judge:

This case presents the question whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq.*, preempts a Georgia state law fraudulent misrepresentation claim based on reasonable reliance that causes a person a loss of benefits which would have been received under a special early retirement program. In light of *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), we hold the plaintiff's state law fraud claims that relate to a qualified employee benefit

plan are preempted by ERISA. Since there is no ERISA claim that could be paid, the district court did not abuse its discretion in denying leave to amend the complaint to alleged a claim under ERISA. We, therefore, affirm the district court judgment.

Chester Sanson alleges that General Motors Corporation (GM) fraudulently represented to him that benefits under a special retirement program would not be offered to Lakewood assembly plant employees. Relying upon that representation, he voluntarily retired under the standard provisions of GM's early retirement program. Sanson claims that but for the representation, he would have continued his employment until it would have been clearer whether the special retirement program would be offered to Lakewood employees.

Shortly after Sanson's retirement, GM offered the special program to certain eligible employees. Sanson immediately contacted GM and demanded that his retirement benefits be increased to the level that the special program provided. GM denied his request, and this action commenced.

Sanson sought to recover the enhanced retirement benefits and compensatory and punitive damages. GM moved for summary judgment, asserting that ERISA preempts Sanson's state law claim. Initially, the district court denied GM's motion, holding the state law claim was not preempted.

> ERISA expressly provides for the preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). State laws, however, that have only a tenuous effect on employee benefit plans are not preempted. . . . The fact that the misrepresentations concerned the availability of an employee benefit plan is only incidental to plaintiff's claim. . . . [Therefore] plaintiff's claim for intentional misrep-

resentation is not preempted by ERISA. (citations omitted).

Dist.Ct.Order, 1:88-cv-827-RCF, (June 28, 1989).

Thereafter, the Supreme Court held in *Ingersoll-Rand Co. v. McClendon*, *supra*, that ERISA's explicit language and its structure and purpose demonstrate a congressional intent to preempt a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under an ERISA-covered plan. GM then requested the district court to consider the application of *McClendon* to its earlier ruling. After ordering GM to file a subsequent summary judgment motion, the district court reversed its prior ruling based on the belief that "a faithful application of the reasoning of *McClendon* to the facts of this case requires a finding that Plaintiff's cause of action under Georgia law is preempted under ERISA," and denied Sanson's request to amend his complaint as "futile." Dist.Ct.Order, 1:88-cv-827-RCF, (May 24, 1991).

Sanson contends that the district court read too much into the *McClendon* decision. *Sanson* argues that *McClendon* addresses whether ERISA preempts a claim under a pension-based state law, but that this case involves whether ERISA preempts a general fraud claim under a non-pension-based state law. He claims that the dividing line for purposes of determining ERISA preemption in this context is between claims that "relate to" an employee benefit plan and claims that "affect employee benefit plans too tenuously to be characterized fairly as relating to employee benefit plans." *Howard v. Parisian*, 807 F.2d 1560, 1564 (11th Cir.1987). Contrary to Sanson's argument, the facts of this case demonstrate more than a tenuous relationship to an employee benefit plan.

In *McClendon*, the United States Supreme Court reversed the Texas Supreme Court's holding that an employee could recover in a wrongful discharge action if he

established that the "principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." *McClendon*, —— U.S. at ——, 111 S.Ct. at 481, 112 L.Ed.2d at 482. Even though other federal courts had held similar claims preempted by ERISA, the Texas Supreme Court attempted to distinguish McClendon's claims because he was "not seeking lost pension benefits but [was] instead seeking future lost wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.* To prevail, however, McClendon had to plead and the court had to find that an ERISA plan existed and the employer had a pension-defeating motive in terminating the employment. Because the court's inquiry was directed to the plan, the Supreme Court held that the cause of action related to an ERISA plan and was, therefore, preempted.

In this case, Sanson claims that GM's misrepresentations were made in furtherance of an objective of achieving a twenty-five percent reduction in salaried employees without the added expense associated with a financial incentive to the employees targeted for removal (*e.g.*, the special retirement program). The measure of damages sought would be against GM and not against a pension plan. To prevail on his state law claims, Sanson would have to prove the existence of an ERISA plan. He would establish that GM intentionally misrepresented his ineligibility for the special retirement program and knew the plan would be available at the time it told him otherwise. He relied upon the misrepresentation and was damaged by the misrepresentation. *See Allen v. Sanders*, 176 Ga.App. 647, 648, 337 S.E.2d 428, 429 (1985). It can be assumed here that he would prevail on his factual claims to state law.

Whether federal law preempts a state action is a question of congressional intent, and "[t]o discern Congress' intent we must examine the explicit statutory language

and the structure and purpose of the statute." *McClendon*, —— U.S. at ——, 111 S.Ct. at 482, 112 L.Ed.2d at 483; *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909-10, 85 L.Ed.2d 206 (1985). ERISA § 514(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall *supersede any and all State laws* insofar as they may now or hereafter *relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

ERISA § 514(a), as codified in, 29 U.S.C. § 1144(a) (emphasis added). Under the plain language of § 514(a), only state laws that relate to benefit plans are preempted. *McClendon*, —— U.S. at ——, 111 S.Ct. at 483, 112 L.Ed.2d at 484. A law "relates to" an employee benefit plan when the law "has a connection with or reference to such a plan." *Id.*; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2899-2900, 77 L.Ed.2d 490 (1983). Thus, "a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *McClendon*, —— U.S. at ——, 111 S.Ct. at 483, 112 L.Ed.2d at 484.

Based upon the Supreme Court's interpretation and application of ERISA in *McClendon*, the district court properly applied *McClendon* to hold that federal law preempts Sanson's state law claims. The existence of a pension plan subject to ERISA is a critical factor in both cases. It was critical in establishing liability under the state's wrongful discharge law in *McClendon*. In this case, the misrepresentation relates to Sanson's retirement benefits available under GM's special retirement plan. The measure of damages would be the amount of benefits Sanson would have received under the retirement plan. Such a

determination of damages demonstrates the relationship between the lawsuits and the special retirement plan.

McClendon recognized certain limits to ERISA's pre-emption clause: that a law normally would not be pre-empted if the statute did not require the establishment or maintenance of an ongoing plan, or if a statute makes no reference to, or functions irrespective of, a plan. *See e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 841, 108 S.Ct. 2182, 2192-93, 100 L.Ed.2d 836 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12, 107 S.Ct. 2211, 2217-18, 96 L.Ed.2d 1 (1987). Although the fraud statute does not involve the existence of a pension plan, the statute would not apply to this case without the existence of the retirement plan. *See also First Nat'l Life Ins. v. Sunshine-Jr. Food Stores*, 960 F.2d 1546, 1549-50 (11th Cir. 1992).

The district court correctly held that *McClendon* mandates preemption of the plaintiff's state law claim.

Sanson alternately contends that if ERISA preempts the state law, the district court abused its discretion in refusing to grant him leave to amend the complaint to state a claim under ERISA. The essential problem Sanson faces is that he does not satisfy the definition of "participant" or "beneficiary" under § 1132 of ERISA. 29 U.S.C. §§ 1002(7)-(8). Only a participant or beneficiary can file a civil action under ERISA. Section 1132 (a)(3) provides in pertinent part that

> A civil action may be brought—
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;
>
> . . . .

> (e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by . . . a participant, beneficiary, or fiduciary.

ERISA § 502, as amended, 29 U.S.C. § 1132.

Sanson acknowledges his inability to express a statutory basis for maintaining the present action under ERISA, but contends that there must be some avenue whereby an individual who is defrauded out of pension benefits can obtain a remedy. Sanson argues that the court should create a federal common law fraud claim under ERISA, and suggests Georgia state law as the reasonable source for this federal common law with recovery limited in accordance with policies dicated by ERISA.

The Supreme Court has previously considered and rejected such an extension of the remedies guaranteed under ERISA:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot [or de-

> cided not] to incorporate expressly." (Emphasis in original).

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 89 (1987) (quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 478 U.S. 134, 146, 105 S.Ct. 3085, 3092, 87 L.Ed.2d 96 (1985) (cited with approval in *McClendon*, —— U.S. at ——, 111 S.Ct. at 485, 112 L.Ed.2d at 487)).

In *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), holding that extra-contractual damages under a federal common law claim were not available under ERISA § 502(a)(3), we reaffirmed the interpretation that § 502 defines the specific circumstances upon which one may be granted legal or equitable relief. *Id.* at 822.

Some courts, while recognizing the absence of an express or implied right of action under ERISA, have allowed for the creation of a federal common law in certain instances. A number of the courts, however, follow the restrictive interpretation of § 502(a) as set forth in *Pilot Life*, *supra*. *See e.g.*, *First Nat'l Life Ins. v. Sunshine-Jr. Food Stores*, 960 F.2d 1546, 1550 (11th Cir. 1992) (argument that ERISA provides inadequate remedy is insufficient reason to overcome language of statute); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 757 (5th Cir. 1990) (ERISA preempts state law claims of fraud and misrepresentation without regard to whether ERISA provided any remedy fo rclaimed wrong); *Lister v. Stark*, 890 F.2d 941, 846 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990) ("[w]hile our holding will leave [plaintiff] without a remedy, the availability of a federal remedy is not a prerequisite for federal preemption"); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (preempting plaintiff's state law claims despite recognition that employer's misrepresentation was a "betrayal without a

remedy"). *But see Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 512, 112 L.Ed.2d 524 (1990) (court created federal common law rule of unjust enrichment to recover monies advanced to plan participant); *Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 98 L.Ed.2d 701 (1986) (finding no cause of action under ERISA, court provided federal common law to find cause of action for employer to recover payments mistakenly made to pension plan).

As further support for the creation of a federal common law, Sanson contends that "Congress specifically contemplated that federal courts, in the interests of justice, would engage in interstitial lawmaking in ERISA cases in much the same way as the courts fashioned a federal common law of labor relations under § 301 of the LMRA." *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir.1989). We have held, however, "[i]n the face of clear precedent to the contrary from the Supreme Court, the Eleventh Circuit, and other Circuits, this Court cannot create a federal common law of remedies for the benefit of the plaintiff on the sole authority of [a congressional report]." *McRae*, 920 F.2d at 823; *see generally Conner v. Aerovox, Inc.*, 730 F.2d 835, 841 (1st Cir.1984), *cert. denied*, 470 U.S. 1050, 105 S.Ct. 1747, 84 L.Ed.2d 812 (1985) ("once Congress has addressed a national concern, court's fundamental commitment to separation of powers precludes it from scrutinizing the sufficiency of [that] solution").

In view of the foregoing precedent, the district court did not abuse its discretion in denying the motion for leave to amend the complaint.

AFFIRMED.

BIRCH, Circuit Judge, dissenting:

I respectfully dissent. At the outset I must acknowledge that the direction of decision in the courts, particularly in the wake of *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), favors a finding of preemption. However, given the acknowledged, underlying purpose of ERISA to protect employees and beneficiaries in employee benefit plans,[1] this case represents the point at which the preemption tide should be stayed. A finding of preemption in this case not only fails to further any such protective policy, it conceivably offers an unscrupulous employer a method of avoiding employee benefit "burdens." An employer in this circuit can now hoodwink a long time employee and leave him stranded without any recourse whatsoever. This result stands the entire statutory scheme on its proverbial head.[2]

I.

The majority holds that the culmination of GM's fraud—the creation of an ERISA plan—is also the very insulation of that fraud. The vehicle the majority uses to reach this surprising result is an overbroad reading of the precedent construing ERISA's preemption language. Under ERISA, state laws are preempted to the

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[1] *See, e.g., McClendon*, —— U.S. at ——, 111 S.Ct. at 482; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983); *Nachwalter v. Christie*, 805 P.2d 956, 960-61 (11th Cir.1986).

[2] I do not subscribe to the view that for every wrong there must necessarily be a remedy. However, where there is a remedy (here a state fraud action), I find it difficult to comprehend, in a common sense way, how a law enacted to protect the very class of individuals into which the appellant squarely fits can be construed to deny him such a preexisting remedy. I am concerned that by adopting such a judicial construction, a court could interpret its way into the province of the legislative branch, and in so doing thwart what Congress set out to accomplish in the first place.

extent that the *laws* "relate to" an ERISA plan.[3] 29 U.S.C. § 1144(a) (1988); *McClendon*, —— U.S. at ——-——, 111 S.Ct. at 482-83. In *McClendon*, the "law" found to be preempted was a judicially created cause of action against *employers who fire employees in order to avoid paying pension benefits*. The Supreme Court found that this very specific cause of action was preempted by ERISA because the *law* creating the cause of action.

> *makes specific reference to, and indeed is premised on, the existence of a pension plan.* In the words of the Texas court, the cause of action "allows recovery when the plaintiff proves that the principal reason for his terminaiton was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." [*McClendon v. Ingersoll-Rand Co.*], 779 S.W.2d [69], at 71 [(Tex.1989)]. Thus, in order to prevail, *a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment.* Because the court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an ERISA plan.

McClendon, —— U.S. ——, 111 S.Ct. at 483 (emphasis added).

This passage demonstrates that *McClendon* does not govern this case. The *law* creating Sanson's cause of action is not a judicially created specific remedy that

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[3] The majority is apparently confused by this point. In support of its preemption analysis, the majority states that "the misrepresentation relates to" the retirement plan and that there is a "relationship between the lawsuit and the special retirement plan." *Ante*, slip opinion at 115. Of course, that the misrepresentation and therefore the lawsuit relates to the plan does not prove that the *law* relates to the plan.

explicitly encompasses pension plans. Instead, Sanson relies upon Georgia's basic and very general law of fraud—a law that encompasses *any fraud*, not just fraud relating to employers who deceive senior employees to employers who deceive senior employees about potential future benefits. For this reason, the Georgia fraud *law* manifestly neither directly nor indirectly affects any ERISA plan, and is therefore distinguishable from the preempted law analyzed in *McClendon*.

As the majority concedes, the Georgia fraud law "does not involve the existence of a pension plan. . . ." *Ante*, slip opinion at 3115. Nor does the Georgia law "make[] specific reference to" a pension plan. *See McClendon*, —— U.S. at ——, 111 S.Ct. at 483. Nor is the law "premised on" the existence of a pension plan. *See id.* Finally, the *law* upon which Sanson relies does not necessarily require him to plead the existence of a pension plan, necessarily require a court to find the existence of a pension plan, or necessarily require a finding that the employer wanted to cheat Sanson from his pension benefits.[4] *See id.* All Sanson's law requires is that he prove fraud, whatever that fraud may be. I submit that *McClendon* therefore does not govern this case. In fact, *McClendon* explicitly stated that it was not dealing with a case like Sanson's: "We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan." *Id.*

II.

The majority correctly acknowledges that "*McClendon* recognized certain limits to ERISA's preemption clause: that a law normally could not be preempted if the statute did not require the establishment or maintenance of an ongoing plan, or if a statute makes no reference to, or

[4] Of course, in this case Sanson might in fact plead the existence of his employer's pension plan. But the facts of his case require him to do that, not Georgia's law of fraud.

functions irrespective of, a plan." *Ante*, slip opinion at 3115. To refute my position that Georgia's fraud law "functions irrespective" of ERISA plans and is therefore not preempted, the majority adopts a "but-for" relationship test. According to the majority, if a plaintiff's lawsuit would not exist "but-for" a pension plan, that lawsuit is preempted by ERISA. *E.g.*, *ante*, slip opinion at 3115-16 ("[The] statute would not apply to this case without the existence of the retirement plan.").

I disagree with such a test for ERISA preemption. To preempt a cause of action, it is not enough that the particular facts of a plaintiff's claim happen to fortuitously involve a pension plan. Consider the employer who sexually harasses the female manager of a company's pension plan. Her state law harassment claim would obviously not be preempted by ERISA simply because the harassment statute might "not apply to [her] case without the existence of the retirement plan." *See ante*, slip opinion at 8115. Instead, her claim could be pursued because the harassment law would not necessarily require her to prove the existence of a plan, even if the law did require her to prove that the plan is what provided her with employment at the company.

The same is true in this case. The Georgia law of fraud only requires proof of a misrepresentation,[5] and not necessarily proof of a misrepresentation *about an ERISA plan*. Apparently, the majority would not have any difficulty if the benefit misrepresented had been the availability of a new Oldsmobile automobile instead of the availabilty of a special retirement program. But why should the substance of GM's misrepresentation matter? The state fraud law utilized by Sanson does not portend to operate according to the content of the fraud; instead, all material frauds are equally actionable. Whether GM lies about a special retirement plan

[5] *See, e.g., Eckerd's Columbia, Inc. v. Moore*, 155 Ga.App. 4, 270 S.Ed.2d 249, 250 (1980).

benefit or an Oldsmobile automobile benefit, the state law at issue still provides a cause of action.

This was not true about the law found to be preempted in *McClendon*. If the employer in *McClendon* fired the employee to avoid giving him the company Oldsmobile, the employer would not have a lawsuit under the judicially created cause of action created by the Texas Supreme Court. Unlike this case, the law analyzed in *McClendon* only allowed suits against employers who fired employees to avoid paying pension benefits; it did not specifically, or even generally, encompass the firing of employees to avoid giving them cars. For this reason, the fraud law in this case does operate irrespective of the existence of a pension plan, even if the wrongful discharge cause of action in *McClendon* does not.

Accordingly, I believe that the mere fact that a plaintiff's proof of a material misrepresentation may involve the availability of a benefit (and that benefit happens to be a special retirement plan, rather than an Oldsmobile) should not be enough to preempt his putative fraud claim. Just as a sexual discriminatee would not lose her harassment claim solely because she might prove she was employed by a pension plan, Sanson should not lose his fraud claim solely because he might prove that his managers lied about future ERISA benefits. Both claims would not exist if a pension plan did not exist. But for me, that kind of "but-for" factual relationship is too tenuous to property invoke the preemptive effect of ERISA.

III.

As a final note, it is important to realize that the difference in result between this case and *McClendon* is particularly disturbing. A careful review of *McClendon* in juxtaposition with the instant case demonstrates what troubles me. The judicially created cause of action in *McClendon* would have been preempted without a textual analysis of ERISA's preemption section because ERISA

provided the plaintiff with an effective parallel federal cause of action. *See McClendon*, —— U.S. at —— ——, 111 S.Ct. at 484-86; *see also* 29 U.S.C. §§ 1140, 1132(a)(3), 1132(e)(1) (1988) (providing an ERISA cause of action for participants alleging that their employment was terminated to prevent the vesting of their pension benefits). That is not true in this case. Sanson has no parallel ERISA cause of action; indeed, the majority relies upon the fact in affirming the district court's refusal to allow Sanson leave to amend his complaint. *Ante*, slip opinion at 3113.

Thus, the policy advanced in *McClendon* and served by ERISA's preemptive force—forcing plaintiffs to assert federal causes of action in order to ensure uniform pension law and in order to adequately notify employers about pension obligations—is entirely absent in this case. Allowing Sanson's claim would not conflict (or even duplicate) federal law because no parallel federal lawsuit exists. And the only notification offered to employers is that they may lie to future retirees about potential future benefit plans without fear of repercussions, as long as the fraud at issue involves misrepresentations as to the very existence of a special retirement plan such that fraud occurs in advance of any plan's existence. In this way, the combination of the majority's holdings—that Sanson's state cause of action is preempted by ERISA even while ERISA denies him any alternative remedy—is disappointingly pernicious to the very goals and desires that motivated Congress to enact pension laws in the first place.

In concluding I acknowledge the sage observation of the Fifth Circuit in *Gonzales v. Prudential Insurance Co.*, 901 F.2d 446 (5th Cir.1990), that "any court forced to enter the ERISA preemption thicket sets out on a treacherous path." *Id.* at 451-52. Perhaps I have entered the thicket and lost the path that my brothers have found and followed. However, if nothing else is clear is that the

"path" is not; obviously the Supreme Court needs to do some serious bushhogging in the ERISA preemption thicket.

I would reverse the district court's determination that Sanson's cause of action is preempted by ERISA. For this reason, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:88-cv-827-RCF

CHESTER C. SANSON

vs.

GENERAL MOTORS CORPORATION

ORDER

[Filed May 28, 1991]

This action is before the court on defendant's motion for summary judgment. Plaintiff opposes the motion.

BACKGROUND

This action arises out of plaintiff's retirement from his employment at defendant General Motors Corporation's Lakewood Plant. Plaintiff contends that his supervisor intentionally misrepresented to plaintiff that he was not eligible for a special early retirement program [the special retirement program]. Plaintiff further contends that he relied on this misrepresentation when he decided to take early retirement under the "regular" early retirement program.

After plaintiff retired, he learned that the special retirement program was being made available to other employees at the Lakewood Plant. Plaintiff contends that he should have been allowed to participate in the special retirement program, and that he would have, but for his

supervisor's misrepresentation about his eligibility for the special retirement program. Plaintiff seeks damages from the defendant in the amount that he would have received from the benefits plan under the special retirement program.

In its order of June 28, 1989, the court denied defendant's first motion for summary judgment on two grounds. First, the court held that plaintiff's state law claim for intentional misrepresentation was not preempted by the Employee Retirement Income Securities Act of 1974 [ERISA], 29 U.S.C. §§ 1001-1381. Second, the court held that determining whether plaintiff would have qualified under the special retirement program would have required the court to make credibility determinations that must be left to the jury.

In its order of June 22, 1990, the court denied defendant's motion for leave to file a motion for reconsideration because the court found that the new authority cited by defendants in support of their earlier summary judgment motion was not relevant to the court's earlier ruling. About one month later, the court denied defendant's motion to file yet another brief in support of its contention that plaintiff's claim in this case was resolvable at summary judgment. *See* Order of July 25, 1990. Defendants subsequently requested that the court certify its order of June 29, 1989 for immediate interlocutory appeal. The court denied the motion, ruling that defendant "failed to make the requisite showing that the Eleventh Circuit's resolution of whether plaintiff's claims are preempted by ERISA would materially advance the termination of this litigation." Order of December 4, 1990, at 3.

In the proposed pretrial order, counsel for the defendant contended that a Supreme Court opinion issued on December 3, 1990, *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), requires the court to grant defendant summary judgment on the ERISA preemption issue. On

February 13, 1991, the court directed defendent to file another motion for summary judgment on the ERISA preemption issue in light of the Supreme Court's decision in *McClendon*. The court has recently received the parties' briefs on this issue and has carefully reviewed the contentions therein. For the reasons discussed below, the court must grant defendant's motion.

DISCUSSION

Defendant renews its motion for summary judgment on the ground that under the Supreme Court's recent ruling in *McClendon*, plaintiff's state law claim for intentional misrepresentation is preempted by ERISA. ERISA expressly provides for the preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).[1] The Supreme Court has concluded that this ERISA preemption clause is "conspicuous for its breadth." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). In confronting this issue yet again, this court fully appreciates another court's assessment that "[a]ny court forced to enter the ERISA preemption thicket sets out on a treacherous path." *Jader v. Principal Mut. Life Ins. Co.*, 925 F.2d 1075, 1076 (8th Cir. 1991).

In its previous orders addressing this issue, the court determined plaintiff's claim was not "related to an employee benefit plan" because plaintiff's claim was based upon defendant's alleged intentional misrepresentations. *See* Order of June 29, 1989, at 2-3. Although all parties agree that the subject of the misrepresentations was plaintiff's eligibility for an employee benefit plan, the court found that such a connection was too tenuous to rule that plaintiff's claim was "related to" an employee

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[1] The parties apparently do not disagree that the special retirement program falls within the statutory definition of an "employee benefit plan." *See* 29 U.S.C. § 1003(a).

benefit plan under ERISA. *See id.*; *see also* Order of December 4, 1990, at 2 citing *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987) (state laws with only a tenuous effect on employee benefit plans are not preempted). The court's ruling was also based on the fact that any damages recoverable by plaintiff in this action would have been paid by defendant, and not by the benefit plan. For these reasons, the court consistently held under the controlling precedent, as it then existed, that plaintiff's claim was not "related to" an employee plan within the meaning of ERISA.

In *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1990), the Supreme Court recently held that a state cause of action for wrongful discharge was pre-empted by ERISA because "the existence of a pension plan [was] a critical factor in establishing liability under the state's wrongful discharge law."[2] In so ruling, the Court could have limited its discussion in *McClendon* to the narrow issue of

> "Whether . . . ERISA . . . pre-empts a state common law claim that an employee was unlawfully dis-

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[2] The court concedes that *McClendon* is in some ways distinguishable from this case. Most importantly, the court believes that the judicially created cause of action under Texas law at issue in *McClendon* (wrongful discharge based on an employer's desire to avoid pension obligations) would have been clearly preempted under pre-*McClendon* law. Indeed, the court's alternative holding in *McClendon* was that the plaintiff's claim was impliedly preempted by ERISA because the Texas action for wrongful discharge directly conflicted with an ERISA provision prohibiting an employee's termination due to the employer's desire to prevent an employee's pension from vesting. *Id.* at 484-86. *See also* 29 U.S.C. §§ 1140, 1132(a)(3), (e)(1) (ERISA sections providing for exclusive jurisdiction of federal courts in civil enforcement action by plan participant alleging that employment terminated to prevent pension from vesting). This alternative holding is inapplicable to cases such as the instant where it is uncontroverted that there is no evidence whatsoever of prohibited conduct under 29 U.S.C. § 1140.

> charged to prevent his attainment of benefits under a plan covered by ERISA . . . .

Id. at 481.

However, the Court chose not to limit its discussion of ERISA preemption to the particular question before it, and instead, set forth some clarifying principles of law relating to the doctrine of ERISA preemption that this court is now bound to apply to this case. Thus, the Court's method of analyzing the plaintiffs's claim in *McClendon* is of primary importance to the issues before this court.

In defining the scope of ERISA "relates to" preemption in *McClendon*, the Court stated that

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Under this 'broad common sense meaning,' a state law may 'relate to' a benefit plan, and thereby be pre-empted, *even if the law is not specifically designed to affect such plans, or the effect is only indirect.*

Id. (cit. omitted; emphasis added). In essence, the *McClendon* Court concluded that because the plaintiff's claim was premised on the existence of a pension plan, his cause of action necessarily "related to" to the ERISA plan. *Id.*

In this case, without the existence of the special retirement plan, plaintiff has no cause of action for intentional misrepresentation under Georgia law. To prevail on his claim, plaintiff must prove that defendant misrepresented a material fact to him on which he relied and which directly caused his damages. *See Eckerd's Columbia, Inc. v. Moore*, 155 Ga. App. 4, —, 270 S.E.2d 249, 250 (1980). The material fact at issue in this case is whether defendant misrepresented plaintiff's eligibility for the special retirement program—an employee benefit plan undisputedly subject to ERISA. *See* Plaintiff's

Statement of Disputed Facts Presenting a Genuine Issue for Trial at ¶¶ 1-2. Thus, plaintiff's claim is "related to" an employee benefit plan under the reasoning of *McClendon*.

Certainly, plaintiff implicitly recognizes the relationship between his claim and the ERISA program because his prayer for relief explicitly requests damages in the amount he would have received under the special retirement program. *See* Complaint at 6. Similar to *McClendon*, plaintiff's claim in this case "ma[kes] specific reference to, and is indeed premised on, the existence of a benefit plan." *See id.* at 483. Thus, under the Court's analysis in *McClendon*, plaintiff's claim is preempted in this case because "there is *no* cause of action if there is no plan." *Id.* at 484.

The court recognizes that "a central policy goal of ERISA is to protect the interest of employees and their beneficiaries in employee benefit plans." *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986), citing *Shaw v. Delta Airlines Inc.*, 463 U.S. 85, 90, 105 S. Ct. 2890, 2896 (1983). The court is troubled that that goal is not furthered by the court's denying plaintiff relief in this case because all parties apparently agree that plaintiff cannot state a claim under ERISA and that any recovery by plaintiff under state law in this action would have been paid by defendant, not an employee benefit plan. Yet, the court believes that a faithful application of the reasoning of *McClendon* to the facts of this case requires a finding that plaintiff's cause of action under Georgia law is preempted under ERISA.

The court notes that the authority on which the court relied in its previous orders has not been cited with approval with regard to the ERISA preemption issue since the Supreme Court issued its *McClendon* opinion.[3] After once again reviewing these cases, the court finds

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[3] *See* Order of June 28, 1989, at 2 citing, *Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Pa. 1987) and *Totton v. New York Life Insurance Co.*, 682 F. Supp. 731 (D. Conn. 1987).

that their analysis is inconsistent with the Court's reasoning in *McClendon*. Moreover, plaintiff has failed to cite to any post-*McClendon* authority in which a court has held that a tort or contract claim under state law is not preempted by ERISA where the measure of the plaintiff's damages is the amount of employee benefits denied. Nor has the court, through its own careful efforts, been able to uncover such authority.

Plaintiff asserts that because he lacks a remedy under ERISA for defendant's alleged misrepresentations with respect to this eligibility for the special retirement program, his claim is not preempted. Plaintiff's Response, at 6-7. However, it is well-settled that a plaintiff's lack of standing to sue under ERISA is not relevant to the question of whether his state law claim is preempted by ERISA. *See, e.g., Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) ("empty oral assurances about rights to pension benefits . . . [are] a betrayal without a remedy"). In view of this court's reading of *McClendon*, the court need not consider plaintiff's remaining arguments.

Accordingly, the court GRANTS defendant's motion for summary judgment and DIRECTS the Clerk to enter final judgment on behalf of defendant. To the extent that plaintiff seeks leave to amend his complaint to state a claim under ERISA, that request is DENIED on account that such amendment is futile. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962) (when determining whether to grant a party leave to amend, court must consider such factors as the futility of the proposed amendment); *see also* Plaintiff's Response, at 6-7 ("[Defendant's] conduct constitutes actionable fraud . . . [but] is outside the scope of ERISA.").

SO ORDERED, this 24th day of May, 1991.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:88-cv-827-RCF

CHESTER C. SANSON

vs.

GENERAL MOTORS CORPORATION

ORDER

[Filed June 29, 1989]

This action is before the court on defendant's motion for summary judgment. Plaintiff opposes the motion.

This action arises out of plaintiff's retirement from his employment at defendant General Motors Corporation's Lakewood Plant. Plaintiff contends that his supervisor intentionally misrepresented plaintiff's eligibility for a special early retirement program (special program) that had been recently announced by defendant and that plaintiff relied on this representation in taking a regular early retirement (regular program) in October 1986. After plaintiff retired, he learned that the special program was being made available to other employees at the Lakewood plant. Plaintiff contends that he should have been allowed to participate in the special program, and that he would have, but for his supervisor's misrepresentation. Plaintiff seeks damages in the amount to would have received under the special program.

Defendant moves for summary judgment on the ground that plaintiff's state law claim for intentional misrepresentation is preempted by the Employee Retirement Income Securities Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381. ERISA expressly provides for the preemption of

"any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). State laws, however, that have only a tenuous effect on employee benefit plans are not preempted. *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987).

Plaintiff relies on *Greendblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Pa. 1987), which held that ERISA did not preempt a state law claim that an employer fraudulently misrepresented that an employee's the pension benefits would be made equal to the benefits available to comparable personnel under a different plan. Similarly, in *Totton v. New York Life Insurance Co.*, 682 F. Supp. 731 (D. Conn. 1988), the court held, on motion for reconsideration that plaintiffs' breach of employment contract claim was not preempted. Plaintiffs in that case contended that as a result of their employer's breach of a promise of continued employment, they lost benefits that would have accrued had their employment not been terminated.

The court finds the reasoning of *Greenblatt* and *Totton* persuasive. The court notes that defendant offers the court no reason to reject *Greenblatt*. Plaintiff's cause of action is based upon defendant's intentional misrepresentations. The fact that the misrepresentations concerned the availability of an employee benefit plan is only incidental to plaintiff's claim. Additionally, if plaintiff prevails, any damages he receives will be paid by defendant, not by an employee benefit plan. Therefore, the court finds that plaintiff's claim for intentional misrepresentation is not preempted by ERISA.

Defendant also moves for summary judgment on the ground that plaintiff would not have qualified under the special program anyway. Under the terms of the special program, an individual could retire only if management agreed. Defendant contends it would not have permitted plaintiff to retire because his departure would have been

disadvantageous to defendant. Defendant relies on the affidavit of Robert Maraffi to support this contention. As plaintiff points out, however, Maraffii's statement is completely self-serving. To accept Maraffi's contention would require the court to make credibility determinations that must be left to the jury.

Defendant also cloims that plaintiff has no proof that management at Lakewood made the statements alleged by plaintiff. Defendant, however, has no proof that management did not make the statements. Again, defendant asks the court to make credibility determinations that belong within the sole province of a jury.

Accordingly, defendant's motion for summary judgment is DENIED.

SO ORDERED, this 28 day of June, 1989.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8528

CHESTER C. SANSON,
Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) FOR REHEARING EN BANC

[Sep. 16, 1992]

Before: TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and RONEY, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Donald Tjoflat
United States Circuit Judge